FILE COPY

Office - Supreme Court, U.
FILED
MAR 14 1950
CHARLES ELMORE CROPL
CLE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 678

GAY STINNETT, *Petitioner*

vs.

THE STATE OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA AND BRIEF IN SUPPORT THEREOF.

W. H. STRICKLAND,
Lenoir, North Carolina,
HENRY B. HUFF,
Lenoir, North Carolina,
Counsel for Petitioners.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Summary of matter involved	1
Jurisdiction	3
Prayer for writ	5
Brief in Support of Petition	6
Jurisdiction	6
Conclusion	13

Table of Cases Cited

State v. *Suddreth*, 223 N. C. 610 (27 S. E 2nd 623)	6
State v. *Lockey*, 214 N. C. 525 (199 S. E. 715)	7
Thornhill v. *State of Alabama*, 310 U. S. 88	8
Chicago Railroad Company v. *Chicago*, 166 U. S. 234	8
Dutiel v. *State*, 284 N. W. 321 at 325	8
J. O. Plott Company v. *H. K. Ferguson Company*, 163 S. E. 688 at 691	8
Elkern v. *McGowern*, 142 N. W. 595 at Page 619	9
Pinson v. *City of Birmingham*, 136 Southern 868	9
Bryant v. *Akron Metropolitan Park District*, 281 U. S. 74 (74 Lawyers Edition 710)	10
Hayes v. *Oklahoma*, 112 Fed. 2nd 417 (U. S. Circuit Court of Appeals)	10
Washington Brewers Institute v. *U. S.*, 137 Fed. 2nd 964	11
Hicks v. *Kenan*, 139 N. C. 337	12
Queen v. *Railroad Company*, 161 N. C. 217	12
Texas Company v. *Fuel Company*, 199 N. C. 495	12

Statutes Cited

Chapter 49, Public Laws of 1937 of North Carolina,	2, 6, 7, 10, 15
North Carolina General Statutes 18-2 (Appendix 8)	6, 17
North Carolina General Statutes 18-50	7
North Carolina General Statutes 1-282	12

TEXTS CITED

Page

Corpus Juris Secundum Constitutional Law, Section 589 9
Corpus Juris Secundum Constitutional Law, Section 587 8

CITATIONS FROM U. S. CONSTITUTION

Amendment 21 (Appendix 3) 10, 14
Amendments 5 and 14 (Appendix 1 and 2) 14
Article 1, Section 8, Clause 3 (Appendix 6) 3, 10, 15
Amendment 8 (Appendix 4) 11, 15
Amendment 1 (Appendix 5) 11, 14, 15

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 678

GAY STINNETT, *Petitioner*

vs.

THE STATE OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA AND BRIEF IN SUPPORT THEREOF.

Summary

At the outset it can be safely said that there is no Statute in North Carolina making the act established by the evidence any criminal offense, and certainly there is no such common law offense. Your petitioner was indicted upon a bill of indictment (RP 2) charging two counts: (1) That he unlawfully and wilfully kept in his possession spirituous and intoxicating liquors for the purpose of sale. (2) That he unlawfully and wilfully kept in his possession spirituous liquors. The Court proceeded under General Statutes 18-2 (Appendix 8, Page 17). This Statute had been repealed and the court had so held by cases cited in the brief filed herewith. The evidence revealed that the police officer

searched the home of your petitioner in his absence and found eight pints of liquor on which the Federal tax had been paid in the bathroom. The officers then proceeded on to another place known as the Pine Grove Inn or Bear's Den and in a supply room in the rear of the establishment they found eight more pints. There is no evidence connecting your petitioner with the whiskey found in the Bear's Den. In fact, the officer testified on RP 11 that he didn't know whose liquor it was that he found in the Bear's Den. The witness, Ben McGaha, testified and his evidence was uncontradicted that the whiskey found at the Bear's Den was his whiskey; that they took it out of his sleeping quarters while he was sleeping and woke him up in the progress of their search; that the place where Mr. Stinnett lived to Pine Grove Inn or Bear's Den was about 150 yards apart; that they had no connection. Both quantities of whiskey bore the Federal tax stamp, yet the officers in an effort to get around the North Carolina Statute, Chapter 49, Public Laws of 1937 (Appendix 7, Pages 15-16) attempted to infer without making the actual charge that both quantities of whiskey belonged to your petitioner; that notwithstanding the fact that Chapter 49 Public Laws of 1937 (Appendix 7, Pages 15-16) authorized the possession of Federally tax paid whiskey up to one gallon, and indeed, it would seem that under the provisions of Section 13 of the said Act that there might not be any limit upon the quantity of tax paid liquor that a person may possess, the limitation of said Act being confined to the question of transportation. That the bill of indictment did not charge the quantity of liquor possessed by your petitioner, and the evidence did not establish that he possessed a greater quantity than was permitted under the North Carolina law. Notwithstanding these facts the trial court instructed the jury that posses-

sion of any quantity of whiskey in Gaston County was prima facie evidence that the whiskey was possessed for the purpose of sale.

Your petitioner at the close of the State's evidence and again at the close of all of the evidence made a motion for judgment as of non suit orally, which is in accord with North Carolina practice and procedure in criminal matters, and that by such motion he raised the following questions:

(a) That the bill of indictment did not charge a crime, since it did not charge the possession of more than one gallon of intoxicating liquor.

(b) That the Due Process Clause had been violated for the reason that the evidence did not disclose that your petitioner possessed more than one gallon of whiskey.

(c) That your petitioner contended that the instruction of the court as cited heretofore that the possession of such liquor was in violation of the law, violated Article 1, Section 8, Clause 3 of the United States Constitution relative to the control of Interstate Commerce between States of the United States.

(d) That your petitioner now contends that the refusal of the Supreme Court of North Carolina to entertain his appeal from a conviction of an alleged crime when neither the bill of indictment charged a crime, nor the evidence adduced by the state established a crime that the same was in violation of the Due Process Clause.

(e) That your petitioner contends that imprisonment on the first count of twelve months and imprisonment on the second count of twelve months suspended upon good behavior was cruel, excessive and unjust punishment when no crime was either charged or proven and that the same

was, therefore, in violation of Amendment 8 of the United States Constitution. (See Appendix 4, Page 15).

Your petitioner further shows that the Supreme Court of North Carolina purportedly refused to entertain an appeal for the reason that his assignments of error were not numbered, but the petitioner respectfully calls the Court's attention to the assignments of error set out on pages 29 through 36 inclusive; that another reason that the court gave was that the brief filed by your petitioner did not contain a statement of facts. It is respectfully submitted that the following statement of facts was included in the brief filed by your petitioner in the Supreme Court of North Carolina: "The officer, R. J. Stroupe, armed with a search warrant, searched what was known as the Pine Grove Inn or the Bear's Den. They found no whiskey there. They did find eight pints in the bathroom on a shelf of the residence of the defendant and his wife. The defendant was not at home at the time of the search (RP 17). The officer then found eight pints in a building to the rear of the Pine Grove Inn, which building was occupied by one Ben McGaha as his living quarters. The witness McGaha was in that building at the time of the search and told the officers that the eight pints there belonged to him; that he rented the building from Mrs. Mozelle Stinnett. The officers attempted to combine the two quantities of whiskey found in this place and bring the whole charge against the defendant Gay Stinnett. There is no evidence in the record that Gay Stinnett owned either quantity of the liquor. The officer stating (RP 11) just before re-direct examination that he didn't know whose liquor it was. The State offered no evidence that either quantity of the liquor was possessed for the purpose of sale. There was no argument or disagreement but what the liquor in question bore the Federal revenue stamps.

The Solicitor at great length had the numbers of those stamps read off. Obviously, for the purpose of showing the similarity of serial numbers on the stamps, but actually the difference in the serial numbers varies from millions to hundreds of thousands in others." The jury returned a verdict of guilty and the Court imposed a sentence of twelve months imprisonment on the first count and on the second count twelve months suspended upon good behavior; that from this judgment your petitioner attempted to appeal to the Supreme Court of North Carolina and the Supreme Court of North Carolina would not entertain the said appeal. Thus the Court of first instance having denied your petitioner his rights under the due process clause, the Supreme Court of North Carolina likewise violated the due process clause in refusing to entertain your petitioner's appeal.

Wherefore, your petitioner respectfully prays this Honorable Court that his petition for writ of certiorari be granted to the end in view that it may be determined whether your petitioner was charged with the crime, or whether the evidence established a crime either under the Federal Laws or the laws of North Carolina, and your petitioner will ever pray such relief.

Respectfully submitted,

W. H. Strickland,
Henry B. Huff,
Lenoir, North Carolina,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Jurisdiction

The Supreme Court of the United States has jurisdiction to hear this case because due process of law was denied your petitioner by the court of original jurisdiction, and the Supreme Court of North Carolina refusing to entertain the appeal, continued to deny due process of law to your petitioner; that this Court has jurisdiction to hear said case for the reasons hereinafter set out.

At the outset it is stated as a fact that there is no North Carolina Statute creating a crime out of the facts involved in this case. The Court and the Solicitor stated that they were proceeding under General Statutes 18-2 (Appendix 8), which Act is commonly known in North Carolina as the Turlington Act, and was passed by the Legislature in 1923.

In 1937 the Legislature passed what is properly known as the Alcoholic Beverage Control Act, which is Chapter 49 of the Public Laws of North Carolina of 1937. This Act in Section 27 thereof provides as follows: "That chapters four hundred eighteen and four hundred ninety-three of the Public Laws of one thousand nine hundred thirty-five be and the same are hereby repealed, except as referred to in this Act, and all other laws and clauses of laws in conflict herewith to the extent of such conflict are hereby repealed."

The Supreme Court of North Carolina was first confronted with the conflict between the two Acts in *State* v. *Suddreth,* 223 N. C. 610; 27 S. E. 2nd 623. In that case the defendant Suddreth had in his possession federally tax paid whiskey in the amount of six pints. The Court held that in the absence of positive proof that he had the

whiskey for sale, he had not committed any crime; "That the Turlington Act of 1923 and Chapter 49, Public Laws of 1937 is in irreconcilable conflict, and to such extent as they are in conflict the Turlington Act is repealed by the 1937 Act. The Court further said to accept any other further construction is to attribute to the legislature the intention to make it lawful for a person to purchase, transport and possess in his home for the purposes mentioned, not more than one gallon of intoxicating liquors or alcoholic beverages, and, at the same time, to make the possession of it evidence of his guilt of a criminal offense for which, upon charges being preferred, he may be convicted by a jury and subjected to punishment therefor. We cannot assume that the legislature had any such inconsistent and conflicting intentions. It is not ours to make the law. That is legislative. It is ours to interpret the law as the legislature enacts it.

State v. *Suddreth* has been reaffirmed since the date of its decision to the present time. As to the petitioner's contention that the trial court having proceeded upon a void bill of indictment which charged no crime under North Carolina law, and the evidence did not establish any crime under North Carolina law was a violation of the Due Process Clause. The applicable Statute at the present time in North Carolina is General Statutes 18-50, which provides as follows: "The possession for sale, or sales, of illicit liquors, or the sale of any liquors purchased from the county stores, is hereby prohibited and a violation of this section shall constitute a crime and shall be punishable by fine or imprisonment, or both, in the discretion of the court." And in construing this Statute in *State* v. *Lockey*, 214 N. C. 525; 199 S. E. 715, the Court held, "The fact of possession does not constitute prima facie evidence that the possession was for the purpose of sale, since the

Statute under which the warrant is drawn does not provide for such prima facie rule." Then this Court has held in *Thornhill* v. *State of Alabama,* 310 U. S. 88 that a conviction upon a charge not made out would be a denial of due process. In Corpus Juris Secundum Constitutional law, Section 587, it is stated that there must be a law creating the offense that the bill of indictment must set out the Acts which constitute the offense with reasonable certainty. In *Chicago Railroad Company* v. *Chicago,* 166 U. S. 234, this Court held, "A state may not, by any of its agencies, disregard the prohibitions of the amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with the amendment. In determining what is due process of law, regard must be had to substance not to form." Then in *Dutiel* v. *State,* 284 N. W. 321 at 325, the court held that, "Due process of law in a criminal case requires a law creating or defining the offense, court of competent jurisdiction, accusation in due form, notice and opportunity to answer charges, trial according to settled course of judicial proceeding, and right to be discharged unless found guilty." Meaning when the above requirements have been met. Then in *J. O. Plott Company* v. *H. K. Ferguson Company,* 163 S. E. 688 at 691, the North Carolina Court held that, "due process meant the general and public law operating equally on all persons in like circumstances."

The North Carolina Court has already held in *State* v. *Suddreth, Supra,* that the possession of whiskey bearing the Federal tax stamp not in excess of one gallon is not a violation of any North Carolina law, yet the trial court disregarded that and subsequent decisions upon the same

question and instructed the jury that any quantity of whiskey in Gaston County, North Carolina, was a violation of the law, and this cause not being founded upon a valid charge and not being supported by valid evidence establishing a crime, constitutes a violation of the due process clause, and when the Supreme Court of North Carolina arbitrarily and capriciously declined to entertain your petitioner's appeal, it likewise violated the due process clause in condemning a man to penal servitude when he had committed no violation of any law of the State of North Carolina. In *Elkern* v. *McGowern,* 142 N. W. 595 at Page 619, the Court held that due process is law according to the principles of natural justice by the rulings of the common law. In Corpus Juris Secundum Constitutional Law, Section 589, it is said that man must not be convicted until the State has made out its case and removed the presumption of innocence by evidence establishing guilt beyond a reasonable doubt.

Certainly, the American Courts have not become so communized that a man may be imprisoned when he has committed no crime under the law of the land as your Petitioner is confronted with in the case at bar. In *Pinson* v. *City of Birmingham,* 136 Southern 868, the Court held that due process is denied unless substantive facts necessary to constitute an offense are alleged. In the case at bar the bill of indictment did not allege the quantity of whiskey the defendant possessed, and the evidence revealed possession of only one gallon, which is entirely legal under both national and State of North Carolina laws. Notwithstanding that fact, the trial court virtually instructed the jury to return a verdict of guilty, and the Supreme Court declined to entertain an appeal. Certainly, whenever a citizen is legally entitled to possess a certain quantity of whiskey then in order to be valid the bill of indictment should charge that

he possessed a quantity in excess of the legal amount. AS TO THE QUESTION OF WHETHER DENIAL OF AN APPEAL WAS DENIAL OF DUE PROCESS, the courts have held in *Bryant* v. *Akron Metropolitan Park District,* 281 U. S. 74 (74 Lawyers Edition 710) that while an appeal is not necessary to due process in the ordinary case, it is necessary if due process has been denied in the tribunal of first instance. In this case, your petitioner was denied due process in the tribunal of first instance, in that, the bill of indictment did not charge that he possessed a quantity of whiskey in excess of one gallon. The evidence showed that he possessed only one gallon, therefore, the denial of his appeal was a denial of due process; that your petitioner was denied due process for the reason that under Amendment 21 of the United States Constitution (See Appendix 3), and under Article 1, Section 8, Clause 3 (Appendix 6) that he was entitled to have the quantity of whiskey in his possession under the Interstate Commerce Clause. The fact that intoxicating liquor is Interstate Commerce is established by *Hayes* v. *Oklahoma,* 112 Federal 2nd 417 (U. S. Circuit Court of Appeals), wherein the court held that although this amendment renders to each state the power to prohibit or condition importations of intoxicating liquor in interstate commerce into the state, it does not surrender power of congress to prohibit or regulate transportation of intoxicating liquor in interstate commerce, and congress has power to enact and penalize its violation. In the case at bar we have North Carolina establishing a method of regulation by Chapter 49 of the Public Laws of 1937, and your petitioner was within the provisions of that Act, and yet, the trial court disregarded the interstate commerce clause and instructed the jury that the defendant was guilty and the Supreme Court declined to hear an appeal.

In *Washington Brewers Institute* v. *U. S.*, 137 Federal 2nd 964, it was held that under this amendment, the states have practically unlimited power to regulate or prohibit the importation of alcoholic beverages irrespective of the commerce or the equal protection clauses, *but interstate commerce in liquor not in violation of state laws is left a matter of national concern.* A matter of equally as great a national concern is the imprisonment of citizens of the United States for a crime neither committed or charged, and which does not in fact exist.

Under Amendment 1, United States Constitution (Appendix 5) citizens of the United States are granted the right to petition the government for a redress of grievances. If a petitioner ever had a grievance the one at bar does for the reason that he is subject to thirty-six months penal servitude by reason of conviction of something which is not a violation of any statutory or common law in the State of North Carolina. Certainly good conscience and justice at the hands of his government is available to your petitioner to correct the wrong which has been imposed upon him.

Your petitioner further contends that under Amendment 8 of the Constitution (Appendix 4) that the punishment imposed is cruel, excessive and unjustified for the reason that he committed no crime. The Petitioner concedes that when a state court has imposed a sentence within the statutory limitations that the same does not constitute cruel or excessive punishment. Your petitioner also contends that he had violated no law and that the North Carolina courts have so held, and still he is faced with penal servitude of thirty-six months.

As to the assigned reasons for the failure to the Supreme Court to hear your petitioner's appeal, if that were true, which they were not as is evidenced by the certified record transmitted herewith, your petitioner was still entitled to a

hearing. In *Hicks* v. *Kenan,* 139 N. C. 337, it is held that Rule 27 then "now 21," or Section 550 of the Code "now G. S. 1-282" required that assignment of error relied on to be tabulated and inserted in the case on appeal or record, preferably at the end. That is what was done in the case at bar and they appear of record; and in *Queen* v. *Railroad Company,* 161 N. C. 217, it was held that it is necessary that the trial judge settle the case on appeal when the parties do not agree.

As seen from the authorities cited hereinbefore, if there is no objections by the appellee to the record served upon him within the time allowed, that record becomes the case on appeal. The same case holds that the judgment rendered is of itself an assignment of error, and the case on appeal or motion *will not be dismissed on the grounds that no error was therein assigned.* Obviously, this ruling entitled the appellant to a decision of his appeal on the merits. In *Texas Company* v. *Fuel Company,* 199 N. C. 495, Conner J., held that where the appellant's statement of his case on appeal is sent to this court as a part of the transcript of record, duly certified by the Clerk of the Superior Court, and it appears that said statement of case on appeal was duly served on appellee within the time prescribed by Statute, or allowed by the Judge, and it further appears that no exceptions or countercase was served by the appellee on the appellant, it stands as the case on appeal and a motion to dismiss will be denied.

General Statutes 1-282 with respect to appellate procedure is as follows: "The appellant shall cause to be prepared a concise statement of the case, embodying the instructions of the judge as signed by him, if there be an exception thereto, and the request of the counsel of the parties for instructions if there be an exception on account of the granting or withholding thereof, and stating separately, in articles numbered, the errors alleged. A copy of

this statement shall be served on the respondent within fifteen days from the entry of the appeal taken; *within ten days after such service the respondent shall return the copy with his approval or specific amendments indorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved: Provided, that the judge trying the case shall have the power, in the exercise of his discretion, to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counter statement of case.''* In the case at bar the Solicitor for the State disregarded the provisions of this Statute and considered the case to be certified as it appears and without notice to opposing counsel or any settlement of the case on appeal by the Judge, the Supreme Court of North Carolina disregarded the requirements of this Statute in a further attempt to unjustly imprison your petitioner upon an alleged crime which does not exist.

Conclusion

In the firm belief that your petitioner can get justice somewhere and be relieved from serving a long prison term merely for the possession of one gallon of tax paid whiskey, which he was authorized to have under all of the laws of the State of North Carolina and the Nation, it is respectfully prayed that a petition of certiorari be granted to the Supreme Court of North Carolina.

W. H. Strickland,
Henry B. Huff,
Lenoir, North Carolina,
Counsel for Petitioner.

APPENDIX 1

Amendment 5 of the United States Constitution: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation."

APPENDIX 2

Amendment 14, Section 1, United States Constitution: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*"

APPENDIX 3

Amendment 21, United States Constitution: "1. The eighteenth article of amendment to the constitution of the United States is hereby repealed. 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by conventions in the several states, as provided in the constitution, within seven years from the date of the submission hereof to the states by the congress."

APPENDIX 4

Amendment 8, United States Constitution: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

APPENDIX 5

Amendment 1, United States Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

APPENDIX 6

United States Constitution, Article 1, Section 8, Clause 3: "The congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

APPENDIX 7

Section 1, Public Laws of North Carolina, 1937, Chapter 49: "The purpose and intent of this article is to establish a system of control of the sale of certain alcoholic beverages in North Carolina, and to provide the administrative features of the same, in such a manner as to insure, as far as possible, the proper administration of the sale of certain alcoholic beverages under a uniform system throughout the state."

Chapter 49, Public Laws of North Carolina, 1937, Section 13: "It shall be unlawful for any firm, person or corporation to have in his or its possession any alcoholic beverages as defined herein upon which the taxes imposed by the laws of congress of the United States *or* by the laws of this state, have not been paid and any person convicted of the viola-

tion of this section shall be guilty of a misdemeanor and fined or imprisoned in the discretion of the court and the alcoholic beverage shall be seized and forfeited, together with any vehicle, vessel, aeroplane or other equipment used in the transportation and to carry the said alcoholic beverages, and the procedure pointed out in Section 18-6 for the seizure, arrest, confiscation and sale of such vehicle, vessel, aeroplane or other means of transportation shall be used and the provisions of said Section 18-6 are hereby declared to be in full force and effect in any of the counties of the state which shall operate under the provisions of this article, *and the possession of such alcoholic beverages in a container which does not bear either a revenue stamp of the federal government or a stamp of any of the county boards of the state of North Carolina shall constitute prima facie evidence of the violation of this section.*"

Chapter 49, Public Laws of North Carolina, 1937, Section 14: "It shall not be unlawful for any person to transport a quantity of alcoholic beverages not in excess of one gallon from a county in North Carolina coming under the provisions of this article: Provided, said alcoholic beverages are not being transported for the purposes of sale, and provided further that the cap or seal on the container or containers of said alcoholic beverages has not been opened or broken. Nothing contained in this article shall be construed to prevent the transportation through any county not coming under the provisions of this article, of alcoholic beverages in actual course of delivery to any alcoholic beverage control board established in any county coming under the provisions of this article."

Chapter 49, Public Laws of North Carolina, 1937, Section 22: "It shall be unlawful for any person, firm, or corporation, to purchase in, or to bring in this State, any alcoholic beverage from any source, except from a county store operated in accordance with this Act, *except a person may purchase legally outside of this State and bring into the same for his own personal use not more than one gallon of such alcoholic beverage.* A violation of this section shall constitute a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court."

APPENDIX 8

General Statutes 18-2: "No person shall manufacture, sell, barter, transport, import, export, deliver, furnish, purchase, or posssess any intoxicating liquor except as authorized in this article; and all the provisions of this article shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed, but only as provided by Title II of "The Volstead Act," act of congress enacted October twenty-eighth, one thousand nine hundred and ninteen, an act supplemental to the National Prohibition Act, "H. R. 7294," an act of congress approved November twenty-third, one thousand nine hundred and twenty-one."

FILE COPY

Office - Supreme Court, U.S.
FILED
MAR 25 1950
CHARLES ELMORE CROPLEY

In The

Supreme Court of the United States

October Term, 1949

No. 678

GAY STINNETT
Petitioner,

vs.

THE STATE OF NORTH CAROLINA,
Respondent.

Brief of the State of North Carolina, Respondent, Opposing Petition for Writ of Certiorari.

HARRY McMULLAN,
Attorney General

T. W. BRUTON,
Assistant Attorney General
Counsel for the State of
North Carolina, *Respondent.*

INDEX

PAGE

Statement of the Case 1

Argument 2

I. The Supreme Court is without jurisdiction to grant the writ of *certiorari*, for the reason that the Petitioner failed to set up in the State Court a claim of rights, privileges, or immunities under the Constitution of the United States 2

II. Whether an exception or assignment of error is properly presented to a state court presents no substantial Federal question 3

III. The question of the sufficiency of an indictment found in a state court is not a Federal question..... 3

IV. The sufficiency of the evidence to be submitted to the jury presents no substantial Federal question..... 3

V. The constitutional privileges and immunities of a citizen are not abridged by an error of the court in the charge to the jury in a criminal case..... 5

VI. The prohibition of the United States Constitution against cruel and unusual punishment is a limitation upon the Federal Government and not upon the states 6

Conclusion 6

Appendix 8

AUTHORITIES CITED

PAGE

AMERICAN RAILWAY EXP. CO. v. KENTUCKY, 273 U.S. 269, 71 L. ed. 639 ..... 4, 5
BARRINGTON v. MISSOURI, 205 U.S. 483, 51 L. ed. 890 3
BELL TELEPHONE CO. v. PENNSYLVANIA PUBLIC UTILITY COMMISSION, 309 U.S. 30, 84 L. ed. 563 4
BONNER v. GORMAN, 213 U.S. 86, 53 L. ed. 709 5
BROOKS v. MISSOURI, 124 U.S. 394, 31 L. ed. 454 ..... 2, 3
BUENA VISTA COUNTY v. IOWA FALLS, ETC., R. R. COMPANY, 112 U.S. 177, 28 L. ed. 680 3
CARTER v. ILLINOIS, 329 U.S. 173, 91 L. ed. 172 6
COLLINS v. JOHNSON, 237 U.S. 501, 59 L. ed. 1071 6
DAVIS v. TEXAS, 139 U.S. 651, 35 L. ed. 300 5
DELMAR JOCKEY CLUB v. MISSOURI EX REL. ATTORNEY GENERAL, 210 U.S. 324, 52 L. ed. 1080 3
HARTFORD LIFE INS. CO. v. JOHNSON, 249 U.S. 490, 63 L. ed. 722 2
HOWARD v. KENTUCKY, 200 U.S. 164, 50 L. ed. 421 5
JOHN v. PAULLIN, 231 U.S. 583, 58 L. ed. 381 3
KEOKUK & HAMILTON BRIDGE CO. v. ILLINOIS, 175 U.S. 626, 44 L. ed. 299 2
MARIA MATHESON v. THE BRANCH BANK OF THE STATE OF ALABAMA, 7 HOWARD 258, 12 L. ed. 692 3
MILLER v. TEXAS, 153 U.S. 535, 38 L. ed. 812 6
MUTUAL LIFE INS. CO. OF NEW YORK v. McGREW, 188 U.S. 291, 47 L. ed. 480 2
NOBLE v. MITCHELL, 164 U.S. 367, 41 L. ed. 472 4
RE ROBERTSON, 156 U.S. 183, 39 L. ed. 389 3
STATE v. STINNETT, 231 N.C. (Advance Sheets No. II, page iii, issued 9 December, 1949) 1
TARRANCE v. FLORIDA, 188 U.S. 519, 47 L. ed. 572 3
WEST OHIO GAS CO. v. PUBLIC UTILITIES COMMISSION, 294 U.S. 63, 79 L. ed. 761 5
WORCESTER COUNTY TRUST CO. v. RILEY, 302 U.S. 292, 82 L. ed. 268 6

STATUTES

28 U. S. C. 1940 ed., Sec. 344 2
General Statutes of North Carolina, Section 1-282 8
Rules 21 and 27½, RULES OF PRACTICE IN THE SUPREME COURT OF NORTH CAROLINA, 221 N. C. 544, 558 8

In The

Supreme Court of the United States

October Term, 1949

No. 678

GAY STINNETT
Petitioner,

vs.

THE STATE OF NORTH CAROLINA,
Respondent.

Brief of the State of North Carolina, Respondent, Opposing Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The defendant was tried at the April 25th Term, 1949, of the Superior Court of Gaston County, North Carolina, and was convicted on charges of unlawful possession and unlawful possession for the purpose of sale of intoxicating liquor. Upon this conviction, he was given sentences of 12 and 18 months. The 18-month sentence was suspended upon the conditions set out in the Record. He appealed to the Supreme Court of North Carolina, and on the 26th of November, 1949, by *per curiam* order, the Supreme Court dismissed the appeal "for failure of case on appeal to state clearly and number the exceptions, and for failure of the brief to state clearly the questions involved." Reference to the order of dismissal is reported in Volume 231 N. C. (Advance Sheets No. II, page iii, issued the 9th of December, 1949). A copy of this order appears in the Appendix herein on page 8.

ARGUMENT

I

THE SUPREME COURT IS WITHOUT JURISDICTION TO GRANT THE WRIT OF CERTIORARI, FOR THE REASON THAT THE PETITIONER FAILED TO SET UP IN THE STATE COURT A CLAIM OF RIGHTS, PRIVILEGES, OR IMMUNITIES UNDER THE CONSTITUTION OF THE UNITED STATES.

Careful examination of the Record will show that, although the Petitioner took exceptions to alleged errors of law, he failed entirely to set up specially any rights, privileges, or immunities claimed under the Constitution of the United States in either the trial court or the Supreme Court of North Carolina. The petition for writ of *certiorari* filed in this Court omits any allegation that Federal questions were set up as such in the State courts.

Under the statute authorizing review by *certiorari* of decisions of the highest courts of the several states, jurisdiction of the United States Supreme Court to review decisions alleged to involve rights, privileges, or immunities under the Constitution is limited to cases in which the rights, privileges, or immunities are "specially set up or claimed."

28 U. S. C. 1940 ed., Sec. 344.

The rights, privileges, or immunities must be set up in the State courts.

BROOKS v. MISSOURI, 124 U.S. 394, 31 L. ed. 454;

HARTFORD LIFE INS. CO. v. JOHNSON, 249 U.S. 490, 63 L. ed. 722;

KEOKUK & HAMILTON BRIDGE CO. v. ILLINOIS, 175 U.S. 626, 44 L. ed. 299;

MUTUAL LIFE INS. CO. OF NEW YORK v. McGREW, 188 U.S. 291, 47 L. ed. 480.

II

WHETHER AN EXCEPTION OR ASSIGNMENT OF ERROR IS PROPERLY PRESENTED TO A STATE COURT PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

Whether or not a question is properly presented to a state court for decision should be determined by applying state laws and rules of court.

BUENA VISTA COUNTY v. IOWA FALLS, ETC., R. R. COMPANY, 112 U.S. 177, 28 L. ed. 680;

TARRANCE v. FLORIDA, 188 U.S. 519, 47 L. ed. 572;

DELMAR JOCKEY CLUB v. MISSOURI EX REL. ATTORNEY GENERAL, 210 U.S. 324, 52 L. ed. 1080;

MARIA MATHESON v. THE BRANCH BANK OF THE STATE OF ALABAMA, 7 Howard 258, 12 L. ed. 692;

JOHN v. PAULLIN, 231 U.S. 583, 58 L. ed. 381.

III

THE QUESTION OF THE SUFFICIENCY OF AN INDICTMENT FOUND IN A STATE COURT IS NOT A FEDERAL QUESTION.

Whether an indictment is sufficient under the Constitution and laws of a state is not a Federal question.

BARRINGTON v. MISSOURI, 205 U.S. 483, 51 L. ed. 890;

RE ROBERTSON, 156 U.S. 183, 39 L. ed. 389;

BROOKS v. MISSOURI, 124 U.S. 394, 31 L. ed. 454.

IV

THE SUFFICIENCY OF THE EVIDENCE TO BE SUBMITTED TO THE JURY PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

When a state court judicially determines that there is sufficient evidence of fact to be submitted to the jury, its decision is not reviewable by the United States Supreme Court on writ of *certiorari*.

NOBLE v. MITCHELL, 164 U.S. 367, 41 L. ed. 472;

AMERICAN RAILWAY EXP. CO. v. KENTUCKY, 273 U.S. 269, 71 L. ed. 639;

BELL TELEPHONE CO. v. PENNSYLVANIA PUBLIC UTILITY COMMISSION, 309 U.S. 30, 84 L. ed. 563.

In BELL TELEPHONE CO. v. PENNSYLVANIA PUBLIC UTILITY COMMISSION, 309 U.S. 30, 32, 84 L. ed. 563, it is stated in a *per curiam* opinion:

> "As to the first contention, it appears that the state court heard the appeal judicially and decided that there was evidence justifying the finding of the Commission of unreasonable discrimination in the transaction of its intrastate business. In the absence of other constitutional objections, it cannot be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of the violation of state law with respect to the conduct of local affairs. The contention that such a decision is erroneous does not present a federal question."

The following paragraph from the opinion of Justice White in NOBLE v. MITCHELL, 164 U.S. 367, 373, 41 L. ed. 472, would seem to be decisive of the question:

> "It is suggested that there is no adequate proof that the policy in controversy was issued by a foreign corporation. This involves a mere question of fact, which was submitted to the jury by the trial court, and as to which the Supreme Court of Alabama said there was evidence sufficient for the consideration of the jury, and which is not subject to review here on writ of error. DOWER v. RICHARDS, 151 U.S. 659 (38:306); RE BUCHANAN, 158 U.S. 31 (39:884)."

If it should be determined that the Supreme Court of North Carolina erroneously decided the case, no question would be presented for determination by this Court for it

has long been held that where a party is fully heard in the regular course of judicial proceedings, an erroneous decision of the state court is not a denial of due process within the Fourteenth Amendment of the Constitution of the United States.

BONNER v. GORMAN, 213 U.S. 86, 53 L. ed. 709;

AMERICAN RAILWAY EXPRESS CO. v. KENTUCKY, 273 U.S. 269, 71 L. ed. 639;

WEST OHIO GAS CO. v. PUBLIC UTILITIES COMMISSION, 294 U.S. 63, 79 L. ed. 761.

In AMERICAN RAILWAY EXPRESS CO. v. KENTUCKY, 273 U.S. 269, 71 L. ed. 639, it is said, at page 273:

> "It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law."

V

THE CONSTITUTIONAL PRIVILEGES AND IMMUNITIES OF A CITIZEN ARE NOT ABRIDGED BY AN ERROR OF THE COURT IN THE CHARGE TO THE JURY IN A CRIMINAL CASE.

A substantial error in the charge to the jury in a criminal case does not deprive the prisoner of the equal protection of the laws.

DAVIS v. TEXAS, 139 U.S. 651, 35 L. ed. 300.

Errors of a state court in interpreting and applying the laws of that state furnish no basis for the claim that there has been a denial of the due process of law guaranteed by the Fourteenth Amendment to the Federal Constitution.

HOWARD v. KENTUCKY, 200 U.S. 164, 50 L. ed. 421.

The Constitution of the United States does not guarantee that the decisions of state courts shall be free from error or require that their pronouncements shall be consistent.

WORCESTER COUNTY TRUST CO. v. RILEY, 302 U.S. 292, 82 L. ed. 268.

Where the proceedings in the state court were conducted under the ordinary forms of criminal prosecutions, there was no denial of due process of law.

MILLER v. TEXAS, 153 U.S. 535, 38 L. ed. 812.

The due process clause of the Fourteenth Amendment does not operate to enforce upon the states a uniform code of criminal procedure; and it is for them to choose the methods and practices by which crime is brought to book, so long as they observe those ultimate dignities of man which the United States Constitution assures.

CARTER v. ILLINOIS, 329 U.S. 173, 91 L. ed. 172.

VI

THE PROHIBITION OF THE UNITED STATES CONSTITUTION AGAINST CRUEL AND UNUSUAL PUNISHMENT IS A LIMITATION UPON THE FEDERAL GOVERNMENT AND NOT UPON THE STATES.

COLLINS v. JOHNSTON, 237 U.S. 501, 59 L. ed. 1071.

In the opinion in this case, on page 510, it is stated:

> "The 8th Amendment is also invoked, with its prohibition of cruel and unusual punishments; but, as has been often pointed out, this is a limitation upon the Federal government, not upon the states."

CONCLUSION

The questions set out in the petition are not Federal questions, or, if they are, the questions are not substantial and are not of sufficient importance to warrant consideration by the United States Supreme Court. None of these questions were set up in the State courts as questions

arising under the Constitution of the United States. Therefore, the writ of *certiorari* should be denied.

Respectfully submitted,

HARRY McMULLAN,
Attorney General

T. W. BRUTON,
Assistant Attorney General

Counsel for the State of
North Carolina, *Respondent.*

APPENDIX

Section 1-282, GENERAL STATUTES OF NORTH CAROLINA:

Case on appeal; statement, service, and return.—The appellant shall cause to be prepared a concise statement of the case, embodying the instructions of the judge as signed by him, if there be an exception thereto, and the request of the counsel of the parties for instructions if there be any exception on account of the granting or withholding thereof, and stating separately, in articles numbered, the errors alleged. A copy of this statement shall be served on the respondent within fifteen days from the entry of the appeal taken; within ten days after such service the respondent shall return the copy with his approval or specific amendments indorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved: Provided, that the judge trying the case shall have the power, in the exercise of his discretion, to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counter statement of case.

STATE v. STINNETT, *Per Curiam* Order:

"The motion of the State to dismiss the appeal in this case is hereby granted for these reasons: (1) The case on appeal does not clearly state and number the exceptions as required by Rule 21 and by G. S. 1-282; and (2) the brief does not comply with Rule 27½ requiring the appellant to state the questions involved on the appeal in such a way as to enable the Court 'to obtain an immediate view and grasp of the nature of the controversy.' November 23, 1949.

"Ervin, J. For the Court."